

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Biennial Regulatory Review – Amendment of)
Parts 0, 1, 13, 22, 24, 26, 27, 80,)
87, 90, 95, 97, and 101 of the Commission's)
Rules to Facilitate the Development and Use of the)
Universal Licensing System in the Wireless)
Telecommunications Services)

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To: The Commission

COMMENTS

SMALL BUSINESS IN TELECOMMUNICATIONS

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SUMMARY

SBT believes that the Commission may be too ambitious in its planned implementation of the ULS. Any discussion of making an incomplete and untested system mandatory is premature. Only by continuing to provide a manual filing track can the Commission accurately compare the costs of manual and electronic methods.

Mandating electronic filing will not result in great overall gains in application processing. Many applications still have to be coordinated by a frequency coordinator. If the Commission does not wish to disestablish the frequency coordination system the Commission should leave to the coordinators the decision whether to accept applications filed on paper.

The Commission should present for public comment a complete analysis of the projected cost of providing the ULS but they do not currently have the authority to collect funds for the provision of access to its databases. The Commission did not discuss any change in the Freedom of Information Act fee schedule or provide FOIA fee exemption for educational institutions, non-commercial scientific institutions, or representatives of the news media. In addition, the FCC is not authorized to change application fees until October 1, 1999. The full cost of maintaining the ULS system should be borne by those who file applications.

The Commission has stated that the instant proceeding is part of its 1998 biennial review. While there may be increased competition in the wireless marketplace, such competition has not been shown to have rendered any of the Commission's current application processing rules no longer necessary.

The ULS system places an unreasonable barrier to entry for small business and new start up businesses. The Commission appears not to have recognized that small business cannot afford to purchase a new computer or upgrade otherwise serviceable software at the whim of the Commission. The cost of participating in the ULS would be in the thousands of dollars in equipment, software and manhours of education.

In view of the known Year 2000 problems within the existing computer systems, as well as the fact the Commission's ability to administer and maintain smaller and less complex databases has not been demonstrated, perhaps the Commission could better allocate the resources towards that end instead of attempting to hasten the ULS launch date.

It would also appear that the NPRM does not comply with the Paperwork Reduction Act by failing to indicate the number of hours to complete Form 601. The public can not provide meaningful comment on the burden to be imposed by the proposed system.

The Commission failed to assess the impact of the proposed rule amendments in its Initial Regulatory Flexibility Act statement to small businesses. The ULS will have a disproportionately adverse impact on small businesses. In small businesses key individuals will have to take time away from running their businesses to learn the ULS system. Additionally, mandatory ULS may have an adverse impact on minority groups and pro se applicants and commenters.

The Commission may not be able to impose mandatory electronic filing requirements at all. Filing electronically would appear to impose a constitutionally

suspect threshold requirement on persons wishing to exercise their rights as citizens to share their opinion of their government.

The Commission should take this time to demand that any entity filing an FCC application, on behalf of a third party, be a licensed attorney. Such a restriction would protect both the public and Commission's processes. The Commission should also require that any electronic signature be traceable to a specific person.

The Commission does not provide justification for not using the internet instead of its own wide area network for access to the ULS. By using the internet the Commission would be able to impose the full cost of maintaining the ULS on those who file applications while providing access to the widest portion of the public at the lowest possible user cost.

The SBT is not opposed to the Commission's ULS. SBT does, however, believe that the ULS should not be mandatory at any time, for any purpose.

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COMMENTS

Small Business in Telecommunications (SBT) by its attorneys, respectfully submits its comments in response to the Federal Communications Commission’s Notice of Proposed Rulemaking. SBT congratulates the Commission for undertaking a wholesale overhaul of its rules in an effort to make the Commission more responsive to the public, but would caution the Commission against inadvertently creating new barriers which would impair the public’s access to government services.

In its NPRM, the Commission proposed to consolidate, revise and streamline rules governing application procedures for radio services licensed by the Wireless Telecommunications Bureau in order to facilitate its implementation of the Universal Licensing System (ULS), and as part of the 1998 biennial review of regulations. A great part of the streamlining effort consists of removing the Commission’s service specific approach to licensing and regularizing application filing procedures for all services. The

Commission is to be commended both for accepting the challenge and completing the task.

The Commission, however, may be too ambitious in its planned implementation of the ULS, and has set January 1, 1999, as the date by which it will require electronic filing of all short-form and long-form applications. SBT respectfully requests that the Commission not mandate electronic filing, for any purpose, at any time, but does support voluntary electronic filing.

The Commission, at the behest of Congress, undertook to investigate any barriers to small businesses wishing to enter the communications marketplace.¹ Contrary to the mandate of Congress, requiring electronic, or computer filing, would create, rather than remove, barriers to small business wishing to enter the telecommunications marketplace.

The common wisdom is that one should not buy a new make of automobile during the first model year, because one is sure to encounter unsolved engineering problems. The Commission's ULS program is not mature; Commission personnel readily admit that certain parts of the system need additional "tweaking".² The public at large should not

¹ In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Report, Released May 8, 1997.

² As currently configured, ULS does not readily permit a user to print out, in final form, a copy of an application, so that it can be reviewed, prior to filing it electronically. One may print out a copy of the application after it has been filed, which the ULS oxymoronically terms a "print preview", however, this does not permit the user

be pressed into service as the Commission's beta test team. Any discussion of making an incomplete and untested system mandatory is premature. Further experience will lead the Commission to recognize that it should never *require* the use of an electronic filing system.

to see the document prior to filing. Computers have been widely used for less than 20 years. Persons who are currently of an age to use the ULS are far more trained and experienced in the reading of paper documents. For that reason, to accommodate the need for an applicant to proofread an application effectively before filing it, the ULS needs to be revised to make it possible for the user to print a copy of an application and review the paper document before committing to filing the application.

When a user does print out a copy of what has been filed electronically, there is no indication, nor is there a facility for indicating, that any attachments have been filed with that application. Since Commission precedents hold that an applicant or licensee has only filed that which that applicant can prove was filed, e.g., with a date stamped receipt copy of the document, the current ULS's inability to indicate that an applicant has filed attachments to an application, much less provide review of the contents of those attachments, is extremely troubling.

Additionally, the Commission should be aware that, in its present configuration, the PPP dialer has the power to damage Windows 95 systems. After downloading and using the Commission's PPP dialer, one of counsel's machines did not permit the storage of passwords in the Windows 95 dialers for other dial up services. To relieve the problem, it was necessary to remove the Commission's PPP dialer, destroy the file containing other passwords, and then reconstitute the password file for all remaining dialers. Before propagating the software to other computers, the Commission has a special responsibility, as the nation's expert agency in the field of telecommunications, to be absolutely certain that its remote access communications software can cause no harm.

Until these, and other, problems are corrected, the Commission is premature in even mentioning the thought of making electronic filing mandatory (or, perhaps, voluntary).

Frequency Coordination

One of the Commission's stated goals regarding electronic filing is to afford parties a quick and economical means of filing applications. However, mandating electronic filing will not result in great overall gains in application processing. All but a limited class of applications will still have to be coordinated by an FCC certified frequency coordinator. Despite their efforts to meet the Commission's 20 day average processing time, certain frequency coordinators have a backlog of up to eight weeks for an application even to be assigned to a processor, much less coordinated and submitted to the Commission. Such a delay in processing renders any gains in Commission processing speed immaterial.

The Commission has not discussed the role of frequency coordination after electronic filing, mandatory or voluntary, is implemented. One of the features of ULS touted by the Commission is real-time error checking. With such a facility, it seems possible for the Commission to institute coordination-free filing. Surely the algorithm can be written to check for co-channel usage and channel loading, and instituting such a program would not tax Commission resources overmuch.

The Commission has experience with computer processing of applications. The 800 MHz backlog was dispatched via the Coalition Gift Program, and the 931 MHz Paging and Radiotelephone backlog was eliminated with a similar program. Surely either of these programs could be modified to operate on a single application basis for purposes

of eliminating the time consuming and costly frequency coordination process. Having undertaken the project, the Commission should follow it to its natural conclusion.

If, however, the Commission is not inclined to dis-establish the frequency coordination system, the Commission should limit any requirement to use the ULS to the frequency coordinating committees, and leave to the coordinators the decision as to whether each will accept applications filed on paper. By requiring the use of the ULS only between the Commission and the frequency coordinators, the Commission can leave to the frequency coordinators the choice of whether to continue to accept paper applications or whether to turn away the business of applicants who desire to file paper applications. For the relatively small number of applications which are not filed through frequency coordinators, the Commission should continue to accept paper applications indefinitely.

The Cost of ULS

In its Notice of Proposed Rulemaking, the Commission hints that it would be willing to decrease the cost, currently \$2.30 per minute, of access to users. The Commission cannot adopt the ULS first and leave to later a determination of the cost to users. The Commission has not established any basis for charging for access to routinely available information via ULS. Access to routinely available information within the ULS does not require the directly attributable activity of any Commission employee, and, therefore, there is no lawful basis for the Commission to charge for access to such

information. Before proceeding further, the Commission needs to present for public comment a complete analysis of the projected cost of providing access to information to the public via ULS.

The Commission does not currently have the authority to collect funds for the provision of access to its databases. The current authority for collecting funds is solely in connection with the Commission's auctions procedures and the amount set was set in regard to an applicant's participation in an FCC auction. If the Commission intends to collect funds from the public for use of the ULS, it must ensure that any charge it prescribes is:

- (1) fair; and
- (2) based on –
 - (A) the costs to the Government;
 - (B) the value of the service or thing to the recipient;
 - (C) public policy or interest served; and
 - (D) other relevant facts

31 U.S.C. § 9701(b).

The Commission must establish regulations regarding ULS which take into account the above described factors and which should also take into account the savings that the Commission expects to realize by adopting this system. The Commission should also consider that the filing of an application via ULS is an event which causes costs which are not currently accounted for in assessing the Commission's application filing fee. Additionally, the filing of an application creates a burden for other members of the public to obtain information necessary to protect their authorized systems. Were it not

for the filing of an application, there would be no need for any person to obtain information concerning that application. Therefore, the Commission should obtain from a person filing via ULS the full cost of providing access to the public via ULS for information concerning that application. The charge to the filer should be sufficient to allow the Commission to avoid imposing any charge for access to information about pending or granted applications.

In addition, the FCC is not authorized to change application fees until October 1, 1999, 47 U.S.C. §158(b)(1). It would not be reasonable for the FCC to proceed with the sweeping changes proposed by the ULS plan until two things happen:

1. The FCC has a reasonably good calculation of the effect of the ULS on the 1999 amendment to the application fees, and
2. Until the FCC is at October 1, 1999, and can adjust its fees to avoid an overage or shortfall in collections.

Until the FCC has a good idea of the effect of the ULS on application fees, it cannot assess the impact of its regulations on small business.

On the other hand, SBT is pleased that the Commission commenced its consideration of the matter of charges for access to the ULS by proposing to limit charges for access to information to "the amount necessary solely to recover the Commission's costs of maintaining ULS, including the cost of protecting the security of the system from outsider tampering," NPRM at para. 5. Basing charges on the

Commission's costs is reasonable, in contrast to the Commission's inadequately justified decision to charge for auction access on the basis of "market price", Assessment and Collection of Charges for FCC Proprietary Remote Software Packages, On-Line Communications Service Charges, and Bidder's Information Packages in Connection with Auctionable Services, 10 FCC Rcd. 10769 (1995) ("Auctionable Services").

Developments since Auctionable Services have demonstrated that charging for access to the ULS on the basis of market price would result in charges of a fraction of one percent of the amount which the Commission decided to charge in Auctionable Services. Since Auctionable Services, the Commission has been providing access to its databases of existing licenses and pending applications at no charge on the Internet. The Commission's provision of that information on the Internet at no charge has established the market price for such information. Were the Commission to contemplate charging for that information on the basis of market price, it would need to consider the charges for provision of Internet service. For example, one of the largest providers, AT&T, charges \$19.95 for 150 hours per month of Internet service. At that rate, AT&T charges for access to all of the information on the Internet at the rate of two-tenths cent (\$0.0022) per minute. Since there is no practical means by which the Commission could recover such a small charge, the Commission could not reasonably charge for access to the ULS on a market price basis.

The Commission's statement that it intended to limit charges solely to those required to maintain the ULS is a fair recognition that the Commission's choice to undertake a high capital hardware and software cost, rather than continuing to rely on human resources, is entirely the choice of the Commission. To date, the Commission has charged fees for application filing and for access to information under the Freedom of Information Act which have been structured to recover the Commission's costs fully. Since the Commission desires to establish a different system, it is just and reasonable for all users of the ULS that the Commission impose on users the cost of maintaining the ULS, but not impose on them the cost of establishing the ULS. In Auctionable Services the Commission indicated that it had incurred certain capital costs in the startup of its electronic filing system, for example, a cost of \$700,000 for telephone cabling, Auctionable Services at para. 14. Those startup costs for hardware and software should have been compensated fully by the charges made to date. For these reasons, SBT applauds the Commission's proposal to charge only for maintaining the ULS.

Paragraph 5 of the NPRM was unclear as to the Commission's exact intentions for allocating costs of the ULS. One reading of paragraph 5 would have persons desiring to use the ULS solely to retrieve information bear the full cost of maintaining ULS, without regard to the fact that demands for information do not cause the full cost of the ULS. Such interpretation is supported by footnote 4 to the NPRM, which states that "applicants will not be charged for on-line access to ULS while they are filing electronically". The entire need for the ULS is the result of the desire of persons to file

applications. The entire need for access to information about pending and granted applications is the direct consequence of the actions of persons filing applications. Accordingly, the full cost of maintaining the ULS should be borne by those who file applications.

The Commission's existing provision of access to its databases on the Internet would appear to establish the cost basis for access to such information under the ULS. The Commission's existing provision of access to its databases on the Internet, without charge, demonstrates that either there is no identifiable, segregable cost, or that the cost is so insignificant that the Commission would not be justified in charging for access to the information electronically.

In sum, it appears that all costs arising out of use of the ULS should be borne exclusively by those persons employing the ULS for filing applications; the agency should continue to calculate such charges as the cost of "maintaining" and not creating the ULS; costs of maintaining the ULS should reflect any saving enjoyed by the agency in its use of an electronic versus a paper filing methodology; and such costs should not create a barrier to use of the ULS for small business.

Freedom of Information Act

The Commission did not discuss any changes to be made to the Freedom of Information Act schedule of fees. These rules would need to be changed to charge per minute access to information which is to be routinely available to the public.

The proposed charge for access to ULS information provides no exemption for educational institutions, non-commercial scientific institutions, or representatives of the news media. Since exemptions for fees for such requestors are required by statute, see 5 U.S.C. § 552(a)(4)(ii), the Commission must provide a means by which such requestors can obtain access to ULS information without incurring any charge.

To protect the public fisc, the Commission must, of course, avoid persons who are not entitled to the exemptions from obtaining improper access, while, at the same time, avoiding entanglement with the freedom of the press. The constitutional protection for free press cannot withstand, for example, any system which requires the filing of and action on an application for a PIN that would provide access to a charge-free dial-up port.

At the heart of this issue is the constitutional right of the press to be provided access to the workings and decisions of the government, for the purpose of reporting those events to the public. That right is not dependent on the nature of the information, whether the information is in text form or if it is in data form, or whether the agency

deems the information "newsworthy." The right of a free press allows for complete and unfettered access, without the need to justify the press' inquiry for that information. The ULS' proposed processed do not provide this unfettered access and, instead, impose charges on the press which are not supported by statute. For this reason, the commencement of the ULS' use should be delayed until the matter is resolved.

Biennial Review

The Commission has stated that the instant proceeding is part of its 1998 biennial review pursuant to Section 11 of the Communications Act of 1934, as amended, therefore, the Commission is both bound and limited in this proceeding to determining whether any of its existing application filing and processing rules "is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service," 47 U.S.C. §161(a)(2). Without showing that its existing application rules are no longer necessary as the result of meaningful economic competition between providers of such service as is regulated by the existing application rules, Section 11 of the Act does not provide any authority for the Commission to review its application filing rules.

Review of the Commission's record will show that, by far, the dominant percentage of licensee applications processed by its current application filing system are for stations that do not provide competitive radio communications service. While there may be increased telecommunications competition in the wireless marketplace, such

competition has not been shown to have rendered any of the Commission's current application processing rules no longer necessary. In view of the distribution of the current uses of station licenses granted by the present application filing system, the Commission would have to make a strong showing of how its existing rules are no longer necessary as a "result of increased telecommunications competition in the wireless marketplace," NPRM at para. 8.³

This consideration is of particular importance when one considers that the Commission's proposed ULS system will also impose new obligations on licensees of ship stations, amateur radio stations, and industrial stations. It is not logical for the Commission to claim that these classes of entities are in competition in the provision of telecommunications services or that the preparation of applications for licenses for operation of those stations creates a competitive environment which necessitates the creation of a mandatory system to increase telecommunications competition in the wireless marketplace. The fact is, no such competition exists. It is, therefore, impermissibly myopic to create a system for one, smaller class of applicants for operation of wireless services (commercial) which will create an unjustified burden for a larger class of wireless operators (private). Absent a showing that the Commission's

³ Had the Commission chosen to proceed under some other grant of authority and in pursuit of some other objective, it might have found its task of changing its application filing rules easier. However, having chosen Section 11 of the Act as the basis for the NPRM, the Commission is obligated to show the nexus which is required for the Commission to proceed under Section 11.

proposed rules are not obvious overreaching, without necessary statutory authority, the agency is not legally positioned to create a mandatory ULS system.

Effect on Small Business

The necessity of having a computer to file an application presents an unreasonable barrier to entry for a small business, if processing of manual applications costs the Commission more (or less) than ULS filing, it can simply charge a higher (or lower) application filing fee. For a small business, providing a higher (or lower) one-time charge for the filing of a manual application may be more conducive to competition than requiring an applicant to acquire an adequate computer at the threshold.

Only by continuing to provide a manual filing track can the Commission accurately compare the contemporaneous costs of manual and electronic methods. It has been suggested that one-third of major software system development efforts fail completely. Taking into account the experiences of the FAA and the IRS and their prolonged, unsuccessful efforts to improve their computer systems, the Commission should recognize the possibility that the ULS will prove to be a boondoggle and should keep itself continuously positioned to detect problems as soon as possible by comparing the contemporaneous use of electronic and manual systems of processing. By continuing to accept manual applications, the Commission can retain the flexibility to expand the manual system quickly, if necessary.

Nor should the Commission require the filing of a disk with a manual application. Such a requirement would impose the same entry burden on a small business as would the ULS, because one cannot produce a disk without a computer.

In addition, the Commission has shown almost no consideration to small business in designing its ULS. The Commission appears not to have recognized that small business cannot afford to purchase a new computer or upgrade otherwise serviceable software at the whim of the Commission. As an example of the Commission's neglect of small business, one cannot gain access to the ULS with Netscape Navigator browsers older than version 3.01. As an agency for all of the public, its software must be written to accommodate the largest possible segment of the public, and, in particular, the needs of small business.

As a threshold matter, the Commission may note that its proposal does not include a cost saving justification for small business and start-up concerns; is not based on any analysis of the amount of time required to educate a typical member of the public regarding the proper use of the agency's software; does not consider the effect of computer or telephone line failure to a business which has only one location for the electronic preparation and filing of applications, as compared to larger entities with multiple offices; and a host of other inherent biases to be created by the proposed ULS. Rather, it is apparent that the primary beneficiary of the agency's proposals is the agency itself.

Although SBT finds commendable the agency's efforts to gain greater efficiencies and to operate at lower costs, such improvements should not be at the expense of small business. Administrative efficiency, standing alone, does not and cannot translate into the agency's fulfilling its mandate to act in the public interest. Administrative efficiency must, instead, be considered on balance with all other factors which together determine whether the Commission is serving the public interest or its internal bookkeeping.

SBT recognizes that the FCC is looking at this matter from the wide end of the funnel, where all applications come to reside from every corner of the Country. However, to assure a balanced, reasoned effort, the agency is required to consider the small end of the funnel. What costs and burdens is the agency imposing on a new, start-up, courier business, which only seeks to obtain a license for a single base station and five portable units? By any reasonable estimation, the cost of participating in the ULS would be in the thousands of dollars in equipment, software, manhours of education, and more. Yet, these costs are not adequately reflected in the Commission's proposal, nor do they adequately appear in the agency's regulatory flexibility analysis. In sum, the smallest and most economically vulnerable members of the public are needlessly, though perhaps inadvertently, disenfranchised. The tenets of equal access to government and justice should preclude the agency's acting to eliminate participation by this class of persons.

Y2K

The Commission is proposing a major computer project to begin operation only one year before the Year 2000. In view of the known Year 2000 problems within the Commission's existing computer systems and the scarcity of resources to apply to those problems, the Commission may find that allocating its scarce resources and expertise to solving known problems before January 1, 2000, rather than proceeding in haste with the new ULS may be better management of its resources. The Year 2000 will not matter to paper filings, but matters greatly to the Commission's existing computer systems.

Indeed, the Commission does not indicate how it will maintain the integrity of its ULS, as compared to its current computer system. Callers to the Commission's call center are not infrequently informed that the status of their application cannot be ascertained because of a failure of the Commission's computer system.

In February 1997, the Commission's Record Imaging Processing System failed. This failure rendered the system inoperable for more than a month, see attached Exhibit I. On October 15, 1997, the Commission announced that it would stop providing public access to the RIPS system on Fridays, see attached Exhibit II.

The Commission's ability to administer and maintain smaller and, presumably less complex, databases has not been demonstrated.⁴ The Commission should proceed with caution with implementing ULS on a voluntary basis, much less a mandatory one.

Letter Requests

The Commission is attempting to eliminate the manual filing of letter requests by mandating electronic filing on an FCC approved form of the same information. According to the Commission, licensees make conscious choices to file a letter rather than a pre-printed FCC form. It would appear, in this instance, that market forces are actively at work and find the letter format preferable to the Commission form. If marketplace forces are to be respected, as they must be in any successful system, the Commission should recognize that the form is not fulfilling the needs of a majority of the market.

Nor should the agency ignore its duty to assist those persons appearing on their own behalf. Pro se applicants and requesters of action by the agency should not be simply turned away or their requests ignored because the agency would prefer a computerized form. Certainly, this attitude is not consistent with the desire to make government more responsive to the needs of the public.

⁴ Access to the Commission's web page is also not 100 percent reliable. SBT's experience has been that the Commission's Web and FTP sites are often not in service on weekends, when access to them would be most convenient to small business.

Paperwork Reduction Act

At paragraph 101 of its NPRM, the Commission invited the public to file comments concerning “the accuracy of the Commission’s burden estimates.” The FCC estimated that the Form 601 would require X hours. In the absence of a digit for the number of hours estimated, it would not appear that the NPRM complies with the Paperwork Reduction Act. It would also appear that in the absence of a figure for X, it is not possible for the public to provide meaningful comment on the matter of the burden to be imposed by the proposed system.

Regulatory Flexibility

In its Initial Regulatory Flexibility Act statement, the Commission failed to assess the impact of the proposed rule amendments on law firms, engineers, consultants, application preparation services, and computer repair service firms, all of which are dominantly small businesses. Accordingly, the analysis was flawed.

In addition, the adoption of mandatory ULS will have a disproportionately adverse impact on small businesses. Larger businesses often employ their own computer specialists, who can be expected to either perform the tasks required by ULS or learn them and teach the key personnel of the company. In a small business, the key personnel of the company, generally the owners, are forced to take time away from running their business to learn the Commission’s computer system. These individuals have widely varying experience with computers, and a widely varying comfort level. This

disproportionately impacts small businesses because they do not have the resources to hire an additional person to handle the computer while they continue to run their business.

Adoption of mandatory ULS could also have an adverse impact, albeit unintentionally, on African or black Americans. An Associated Press report of a study published in Science magazine, attached hereto, indicates that "white students in high school and college are more likely than black [students] to have home computers and use the World Wide Web, even after accounting for differences in income."

According to the report, "73 percent of white students had a computer at their home but only 33 percent of black students did. The gap remained even when researchers accounted for differences in income." The report continued to indicate that white students without their own computers are more likely to find another place to access the web than black students are.

The Commission has a mandate to "disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women," 47 C.F.R. §309(j). Available evidence would suggest that requiring applicants for licenses to use computers to file applications electronically would have an adverse effect on the Commission's ability to meet the objectives of disseminating licenses to members of minority groups.